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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-35

FAIR LAWN EDUCATION ASSOCIATION,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND FOR A STAY OF COLLECTION OF FINE

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No.

FAIR LAWN EDUCATION ASSOCIATION,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Fair Lawn Education Association, a non-profit corporation of the State of New Jersey, petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey, and for a stay of collection of fine in the sum of $17,350, pending disposition of the matter by this Court.

Opinions Below

The opinion of the Supreme Court of New Jersey on appeal granted from the affirmance (as on trial *de*

novo) by the Appellate Division of the summary conviction for contempt for violating a restraining order of the Chancery Division of the Superior Court of New Jersey is dated May 21, 1973, and is not yet reported, but is set forth at Appendix A, *post*.

The opinion of the Appellate Division of the Superior Court is not yet reported, but is set forth at Appendix B, *post*.

Jurisdiction

The judgment of the Supreme Court of New Jersey affirming the judgment of the Appellate Division of the Superior Court of New Jersey, was entered on May 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

Questions Presented

1. Whether imposing a fine exceeding $500 upon a non-profit corporation found guilty in a trial (with jury denied) of criminal contempt for violating a restraining order violates the United States Constitution?

2. Whether a state court may deny a jury trial to a non-profit corporation charged with criminal contempt for allegedly violating a court restraining order at some distance away from the court room and court house, and after finding of guilty validly sentence that corporation to a fine exceeding $500?

Constitutional and Statutory Provisions Involved

28 U.S.C. Sec. 1257 (3).

Sixth Amendment to the U. S. Constitution.

Fourteenth Amendment to the U. S. Constitution.

New Jersey Constitution, Art. 1, Par. 19.

New Jersey Statute 2A:10-1, 2A:85-6, 2A:85-7, 2A:169-4.

(For the foregoing see Appendix G, *post.*)

Concise Statement

The peitioner, Fair Lawn Education Association, is a non-profit corporation of the State of New Jersey, which represents the teachers and related personnel employed in the school district of the Borough of Fair Lawn in Bergen County, New Jersey. The Association serves as the collective bargaining representative of the said persons under Chapter 303, New Jersey Laws of 1968, N.J.S.A. 34:13A-1 *et seq.*

As the opinion of the Appellate Division as on trial *de novo* shows (*post*, Appendix B), the petitioner, Fair Lawn Education Association, and 14 officers and teachers were charged before the Chancery Division of the Superior Court of New Jersey by a verified petition of their employer, the Board of Education, with having violated a restraining order of the Court and thereby committed contempt of court. As the decision of the Appellate Division indicates:

> "15 separate Orders to Show Cause were issued, each charging the Association and one of the individual defendants with violating the restraining

order and requiring him to show cause why he should not be held in contempt.

"All were tried in one consolidated non-jury trial, following which each was found guilty of violating the January 22 restraining order. The Association was fined $17,350."

The complaint filed by the Board of Education in the Chancery Division of the Superior Court of New Jersey charged the Association and its officers and others with having entered into a collective bargaining agreement for the school year 1970-71 and because of inconclusive negotiations in the fall for a contract for the succeeding school year, the defendants and others in the bargaining unit commenced a work stoppage, and on January 22, 1971, 99½ percent of the certificated personnel represented by the Association were absent from the schools; that the absence was a coercive activity for the purpose of compelling the Board of Education to act in accordance with the desires of the teachers and constituted a violation of the existing agreement between the parties and a violation of law. On January 22, 1971, the Judge of the Chancery Division issued an order restraining the defendants from counseling, advising, participating in, aiding, abetting or continuing a strike or work stoppage in the schools of the Board of Education.

On January 27, 1971, the Board of Education filed a verified petition alleging that the Association and the individual defendants had been served with a copy of the verified complaint and order to show cause with restraints and that defendants were continuing with the strike and forced the schools to close on January 22, 25 and 26, and prayed that the defendants be adjudicated in contempt of court. An order to show cause was thereupon issued by

the Court dated January 27, 1971, reciting the filing of the petition and that it had alleged that the Association had violated the order of January 22 (without specifying the dates on which allegedly violated) and ordering the Association to show cause before another judge of the Chancery Division on February 8, why it should not be held in contempt of court. A true copy of the order to show cause is attached hereto, marked Appendix C and made a part hereof.

On the return day the matter was adjourned and ultimately the order to show cause in contempt against the Association (supra) and the individual defendants were all "consolidated for trial and all other purposes".

The prosecutor moved to consolidate the 15 separate orders to show cause in contempt against the Association and its 14 individuals, and over defense objections the Judge granted same.

On the opening day of the trial the defendants moved for trial by jury because that would affect the extent of the penalty that might be imposed. The trial judge ruled that he would treat these offenses

> "as offenses that could be tried without a jury as petty offenses. The word 'petty' is really and solely to the type of punishment and not to be confused with the alleged contempt itself * * * I will, however, treat it as a petty offense for the purpose of imposing penalties, if indeed these people are found guilty of contempt * * *."

At the conclusion of the trial the judge found every defendant guilty and fined the Association $17,350 and subsequently wrote a letter opinion saying that it was valid to impose that size fine upon the defendant, even though it was a petty offense.

The Appellate Division of the Superior Court, reviewing the case on appeal as upon trial *de novo* on the record below, sustained the findings of guilt and the penalties, particularly the fine of $17,350 on the Association, stating:

> "There is no merit to defendants' contention that the consolidation of the trials of all the individual defendants and the imposition of a fine upon the Association in excess of $500, violates the constitutional right of each defendant to a jury trial. *In Re Jersey City Education Assoc., supra,* 115 N. J. Super. at 51-58."

On petition for certification by the Association and the 14 individuals for review of the judgment of the Appellate Division, the Supreme Court of New Jersey promptly denied the application as to the individuals, and granted it solely as to the Association. 60 N. J. 500, 291 A. 2d 144 (1972). After further briefing on the subject of the legality of the fine of $17,350 against the Association and oral arguments, the Supreme Court of New Jersey affirmed the legality of such a large fine in a written opinion, a copy of which is marked Appendix A, attached hereto and made a part hereof. —— N. J. ——, —— A. 2d —— (May 21, 1973).

Therein the court overruled the argument of the Association based upon decisions of this court and the U. S. courts of appeal that the sum of $500 is the largest fine which may be imposed in the trial of a petty offense, and that any fine greater than that categorizes the offense as a non-petty offense and entitles the defendant to trial by jury, unless waived.

The Association now petitions for certiorari in order to have this court pass upon and adjudge whether the U. S.

Constitution entitles a non-profit corporation, such as the Association, to a trial by jury where the court contemplates imposing a fine greater than $500 or whether a court having denied such a defendant a trial by jury may thereafter impose a fine exceeding $500.

REASONS FOR GRANTING THE WRIT

Imposing a fine exceeding $500 upon a non-profit corporation found guilty in a trial (with jury denied) of criminal contempt for violating a restraining order violates the United States Constitution.

The essential and important question raised in this case is whether, after a trial court has denied a non-profit corporation a trial by jury on a criminal contempt of court charge, it may lawfully impose a fine upon that defendant exceeding $500, or whether such a greater fine violates the United States Constitution and its amendments.

The case involved orders to show cause in contempt against 14 individuals and 1 non-profit corporation, which were consolidated by the trial judge into one. At the start of the trial, among the motions denied by the trial judge, was one demanding a trial by jury. The trial judge, after finding all guilty, fined the Association the sum of $17,350, and fined the individuals $400 each and 6 months imprisonment, one month of which was to be in custody and the balance suspended with terms of probation. On appeal the Appellate Division of the Superior Court, deciding the matter on the record *de novo,* sustained all the judgments of guilt, rejecting all the arguments presented, and reimposed the fine on the Association in the sum of $17,350 and the fine and sentences on

the individuals except reducing the conditions of probation.

The Supreme Court of New Jersey granted certification only as to the Association and rejected the application of the individuals and they have all since then paid their fines and served their terms of confinement, etc. The appeal of the Association was argued and the Supreme Court wrote an opinion dated May 21, 1973, marked Appendix A and printed post. Therein the Supreme Court rejected all the arguments of the Association and affirmed the penalty of the fine of $17,350.

This Court, in *Bloom* v. *Illinois,* 391 U. S. 194 (May 20, 1968), held that prosecutions for serious criminal contempt are subject to the jury trial provisions of Article III, Section 2, of the United States Constitution and of the Sixth Amendment, which is made binding upon the states by virtue of the due process clause of the Fourteenth Amendment. This Court further held in that case that a trial of a defendant in a state court on a charge of criminal contempt (for which under the state law no maximum punishment was provided), and in which the defendant's timely motion for a jury trial was denied by the court, and the defendant found guilty and sentenced to imprisonment for 24 months, violated the aforesaid provisions of the United States Constitution.

This Court pointed out that, although criminal contempt is not a crime of the sort that always requires the right to jury trial, regardless of the penalty involved nevertheless, when, under the rule in *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), the state Legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, then the courts are to look to the penalty actually imposed as the best evidence of the seriousness of the offense.

In *Duncan* v. *Louisiana*, 391 U. S. 145 (May 20, 1968), decided the same day as *Bloom, supra,* the Court said that the right to jury trial in serious criminal cases is a fundamental right and must be recognized by the state as part of their obligation to extend due process of law to all persons within their jurisdiction; that a right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. This Court held that it is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions and should not be subject to the Fourteenth Amendment jury trial requirement, but the penalty *authorized* for a particular crime is of major relevance in determining whether it is serious or not, and may in itself, if severe enough, subject the trial to the mandate of the Sixth Amendment.

In conclusion, this Court said:

> "In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial, we are counseled by District of Columbia v. Clawans, supra, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. We need not, however, settle in this case the exact location of the line between petty offenses and seri-

> ous crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it." (Emphasis added)

Inasmuch as the penalty actually imposed below in *Duncan* v. *Louisiana, supra,* was a sentence of 60 days in prison and a fine of $150, this Court did not attempt to specify the maximum size of fine which would convert an offense into a serious, rather than a petty, offense.

Similarly, in *Bloom* v. *Illinois, supra,* the penalty being reviewed by this court was 24 months imprisonment and again the court found no occasion to discuss the maximum permissible fine under the circumstances of a non-jury trial for an alleged petty offense.

In the present case the trial judge sentenced the Association to a fine of $17,350 for its non-violent action of inducing or directing its member teachers et al. to violate the temporary restraining order. The Appellate Division affirmed the finding of guilt and the amount of fine. The Supreme Court affirmed the amount of the fine and held it constitutionally valid. The Supreme Court of New Jersey pointed out that there is no universal right to a jury trial merely because of the risk of a dollar judgment.

> "So far as money is concerned, judges in equity have always decided issues of civil liability, no matter how large the claim, without the aid of a jury."

The Supreme Court of New Jersey thereupon referred to the fact that in the celebrated case of *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947) a fine of $10,000 had been imposed upon the defendant Lewis and a fine of $3,500,000 upon the defendant Union for violating a court order enjoining a strike. It pointed out that this Court there held that there was no right to a jury trial. However, the Supreme Court of New Jersey was somewhat inaccurate as to this. In *Mine Workers* this Court held there was no right to trial by jury because Sec. 11 of the Norris-LaGuardia Act did not apply to that case (330 U. S. at 298). Not the slightest mention was made of any constitutional right to trial by jury as has since been held in *Bloom* and *Duncan, supra*. This Court also there held that the contempt proceeding could deal with both civil and criminal contempt in the same proceeding, a thing no longer permitted in the Federal or New Jersey practice, and therefore, presumably, those fines included both. In *Mine Workers* this Court held that the fine upon Lewis was *valid;* and as to the Union, the majority of this Court concluded that $700,000 be imposed unconditionally with respect to the wrong done, with the balance of $2,800,000 of the fine made conditional.

Also a lot of water has run over the dam since 1947. As this Court pointed out in *Duncan* v. *Louisiana, supra,* this Court is aware of prior cases by this Court in which the prevailing opinion contains statements contrary to the holding in the *Duncan* case that the right to jury trial in serious criminal cases is a fundamental right, and hence must be recognized by the states as part of their obligations to extend due process of law to all persons within their jurisdiction. Accordingly, it is more than doubtful that this Court, in 1968, when it decided *Duncan* and *Bloom*, would have sustained a similar sized fine running to millions of dollars, or will sustain such fines today.

Accordingly the simple argument that inasmuch as such large fines were sustained as to Lewis and as to the United Mine Workers, therefore the $17,350 fine imposed upon the present petitioner are also lawful, is clearly erroneous.

It must be borne in mind that the Union in *United Mine Workers* was not a corporation, but an unincorporated association, whereas the present petitioner is a nonprofit corporation. It is equally doubtful that this Court would today sustain a fine of $10,000 against an individual such as Lewis, as it did in that case 25 years ago, except if it includes both civil and criminal penalties.

Joining such civil and criminal contempt fines is forbidden by the New Jersey Practice as expressly noted by the Supreme Court of New Jersey in its opinion in this very case. *Rules Governing the Courts of the State of New Jersey,* Rule 1:10-5.

This Court held in the *Bloom* case that a charge of criminal contempt of court is a charge of serious crime if the penalty authorized or actually imposed exceeds 6 months.

As stated by Justice Goldberg, dissenting in *United States* v. *Barnett,* 376 U. S. 681, 728, at p. 754 (1964):

> ". . . criminal contempts are not essentially different from other 'crimes' or 'criminal prosecutions'. In each case, punishment is imposed for a past violation of a mandate of a coordinate organ of a government; criminal contempt involves punishment for violation of an order of a court; 'crime' involves punishment for violation of a statute enacted by a legislature. I can see no greater need for certain and prompt punishment for the former than for the latter."

The dissenting opinion in that case (*Barnett*) appears to have led the way to the majority opinion in *Bloom* and *Duncan, supra.* Thus, the lack of real distinction between "criminal contempt" and a "crime", which Justice Goldberg bespoke in the above quotation, has now become accepted by the majority of this Court.

As the Court pointed out in *Bloom, supra,* at 196, the decision in *Barnett, supra,* signalled a possible change of view, when a 5-man majority held that there was no constitutional right to jury trial in all contempt cases. *Barnett* was followed by *Cheff, supra,* and thereafter by *Duncan* and *Bloom,* which finally sustained the full constitutional right to trial by jury in serious criminal contempt cases in state courts. Thus the quotation above from Justice Goldberg dissenting in *Barnett, supra,* is very pertinent to the state of law as it exists today. There can be no distinction between "criminal contempt" and other "crime" or "criminal prosecutions".

This Court has permitted to stand a distinction between petty criminal contempts and serious criminal contempts, just as there is a distinction between petty criminal offenses not requiring trial by jury and serious criminal offenses which have a constitutional guarantee of trial by jury.

This Court has found a difference in seriousness of sundry types of criminal contempt of court based upon whether or not the violation is by doing or failing to do an action outside the presence of the court, or whether the violation is activity disruptive of the court proceedings.

Thus, in *Bloom, supra,* the court was dealing with contempt of court based on an attorney wilfully petitioning to probate a will falsely prepared and executed after the death of the putative testator, whereas in *Mayberry* v.

Pennsylvania, 400 U. S. 455 (1971), the defendant was found guilty of contempt for vilifying the trial judge during the course of the defendant's trial on a criminal statutory charge. The majority of the court was of the opinion that the trial judge could have sentenced Mayberry for contempt of court summarily and forthwith, but that having delayed doing so, until after the jury verdict after 21 days of trial, the defendant was entitled to a trial before a judge other than the judge reviled by the contemnor.

In *Illinois* v. *Allen,* 397 U. S. 337 (1970), this Court held that a defendant in a criminal trial who engaged in speech and talk which is so noisy, disorderly and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial, may thereby lose his right of confrontation under the Sixth and Fourteenth Amendments and may be removed from the court room while the trial continues. This Court said there are at least three constitutionally permissible approaches for the court's handling of an obstreperous defendant: (1) bind and gag him as a last resort, thereby keeping him present; (2) cite the defendant for criminal or civil contempt; or (3) remove him from the court room while the trial continues until he promises to conduct himself properly.

See also *Johnson* v. *Mississippi,* 403 U. S. 212 (1971).

However, the Supreme Court of New Jersey claimed to find a real and valid distinction between criminal contempt and crime. In the *Fair Lawn* decision that court said:

> "the summary power rests upon necessity. With respect to court orders, the subject matter before us, the court must be able to compel immediate compliance if the court is to be equal to its responsibility under government. Therein lies the critical

> difference between a violation of a court order and a violation of some penal statute." (Appendix C, *post*).

The Supreme Court of New Jersey went on to say that the underlying need for immediate compliance with an injunctive order could be met on the basis of distinguishing the consequences which ensue upon conviction for a "petty offense" from those which ensue upon conviction for "crime" and that it had accepted a maximum jail term of 6 months as adequate, citing its decision in *In Re Buehrer,* 50 N. J. 501, 517-522, 236 A. 2d 592 (1957). That court then went on to accent the fact that in the *Buehrer* case the court was concerned with an individual and not a corporate offender, and that it was rejecting the rule of this Court in *Bloom* v. *Illinois, supra,* because the *Bloom* case "did not present the element of urgency involved when an injunctive order is disobeyed". Thus, the Supreme Court of New Jersey drew a hitherto unknown distinction between contempt of court complaint for violation of court injunction by activity outside and away from the court room, which involved "an element of urgency" and those which did *not* involve any element of urgency, as *that* court saw the facts.

Perhaps the Supreme Court of New Jersey (although this is not clear) was implying that just as certain elements of disorder created by a person present in the court room could justify summary and unlimited punishment in order to stop the disruption of the court's proceedings, so there could be an element of "urgency" where someone disobeyed a court injunction restraining activities at some distance from the court room.

However, this Court has never drawn this distinction, but has confined its version of urgency to those cases where the activity was disrupting court proceedings; e.g.,

Mayberry, supra; Allen, supra; and *Johnson* v. *Mississippi, supra.*

This Court said in *Duncan, supra,* that

> "The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgment' 300 U. S. at 628, of the crime in question." (391 U. S. at 160)

The Legislature of New Jersey has expressed the public policy of the citizens of the State as to which offenses are serious, which are petty and what are adequate maximum penalties for the several kinds; thus: (a) disorderly persons offenses (a wide variety of petty offenses) appears in N.J.S. 2A:169-1 through N.J.S. 2A: 171-12; (prior to the decisions in *Bloom* and *Duncan* on May 20, 1968, the maximum penalty for disorderly persons offenses was $1,000 or 6 months, or both, and immediately upon this Court handing down those decisions the Legislature downgraded the maximum penalty for disorderly persons to $500 or 6 months, or both (N.J.S. 2A:169-4, as amended by New Jersey Laws 1968, c. 113)); (b) the present maximum fine for violation of municipal offenses is $500 (N.J.S. 40:49-5, increased from $200 by New Jersey Laws 1968, c. 30, Sec. 1); (c) the present maximum fine for violation of county resolutions is still $200 (N.J.S. 40:24-2); (3) and the present general penalty (maximum) under the Motor Vehicle Act and under the Traffic Act is a fine of $50 or 15 days, or both (N.J.S. 39:3-8 and 39:4-203).

The Supreme Court of New Jersey conceded in *State* v. *Owens,* 54 N. J. 153, 254 A. 2d 97 (1959) that "the maximum punishment for a petty offense is below that authorized for crime", and that the general penalty for crime is a maximum fine of $1,000 or imprisonment, or

both (N.J.S. 2A:85-7), and even high misdemeanors generally are subject only to a maximum fine of $2,000 or imprisonment, or both (N.J.S. 2A:85-6).

Thus, the $17,350 penalty imposed by the trial court and affirmed by the Appellate Division of the Superior Court and the Supreme Court is far in excess of that for the general run of crimes known as misdemeanors (in New Jersey), and even for high misdemeanors, as to both of which grades of crime the Association would have been entitled to indictment *and* trial by jury.

The Association being a non-profit corporation is by N.J.S. 1:1-2 deemed a "person" for the purposes of New Jersey laws, and is so for all constitutional purposes by decision of this Court. *Grosjean* v. *American Press Company, Inc.*, 297 U. S. 233, 244 (1936), where this Court said:

> "but a corporation is a 'person' within the meaning of the equal protection and due process of law clauses * * *."

The attorneys for the defendant (including the Association) moved for a trial by jury, inasmuch as there existed a possibility that the trial court might sentence any one or more of the defendants to a severe penalty, and the trial court denied that motion. Surely it is erroneous to hold that where a corporation is convicted of a "petty offense", to wit, contempt of court, that such corporation may be fined $17,350, whereas an individual person who commits the same offense may not be fined exceeding $500.

The Supreme Court of New Jersey in its opinion in *Fair Lawn* proceeded as if the legislative determination of what is a serious offense and what is a petty offense and what are appropriate maximum penalties for such

various offenses cannot apply to contempt of court cases because this is solely within the determination of the Supreme Court of New Jersey, regardless of whether the violation occurred in an actual court room and was disruptive of then on-going court proceedings or occurred at a location miles from the court room and did not disrupt any court activities in any manner whatsoever. As far as determining what is the law in New Jersey under the New Jersey Constitution and common law, perhaps the New Jersey Supreme Court has the last say, but certainly that cannot be true in a case such as this one in which the size of the fine is violative of the Federal Constitution and its Amendments, to wit, the Sixth Amendment and the Fourteenth Amendment, as explained above.

If there ever is a time when a jury trial may be denied a defendant accused of contempt of court for violating a restraining order by actions some distance away from the court it may be that this is limited to factual situations such as interference with fire fighters leaving their fire house in response to a firm alarm or interference with fire fighters at the scene of a fire, but that is a far cry from any alleged interference with the operation of public schools. In the one case the fire fighters are on duty 365 days a year, 24 hours a day, whereas schools in New Jersey, to receive State aid (a very important part of the school budget) is by law required to operate at least 180 days during the school year (N.J.S. 18A: 58-16), and we all know that there is normally only one shift of teachers, so that schools operate 7 or 8 hours each day, and have any number of legal holidays when school is closed, as well as midterm vacations and a several month summer vacation. Where can this be considered at all comparable to the situation of fire fighters! If fire fighters are interfered with there may be a flag-

rant destruction of property and lives because of a holocaust. On the other hand, the loss of a few days in school is not comparable at all, particularly when one keeps in mind that the end of the term can be postponed and extended to make up the missing days.

The Supreme Court of New Jersey does not cite any case in support of its novel theory, and we are not aware of any case supporting it.

On the other hand, we called the attention of the Supreme Court of New Jersey to several cases supporting our position, to wit, the cases hereinabove cited and *United States* v. *R. L. Polk & Co.*, 438 F. 2d 377 (6 Cir. 1971), where the Court of Appeals found imposition of a fine upon a corporation exceeding $500 to be invalid and reduced the same to that sum, because the contempt proceedings did not involve a jury trial and therefore the offense had to be treated as a petty offense.

Polk was followed in *County of McLean* v. *Kickapoo Creek, Inc.*, 51 Ill. 2d 353, 282 N. E. 2d 720 (Ill. Sup. Ct., 1972), where the fine on the corporate defendant had exceeded $500.

We submit that the only proper conclusion is that corporations are entitled to be treated as persons and may not lawfully be denied a trial by jury in a criminal contempt case and then fined more than $500. The election of the state to proceed by way of summary contempt proceedings is an election to treat the offense as a "petty offense" and this limits the fine portion of the penalty to $500 maximum, regardless of whether the defendant is an individual or a corporation.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

EMIL OXFELD
Attorney for Petitioner

Application for an Order Staying Collection of Fine

Petitioner respectfully requests this Honorable Court to issue an order staying the collection of the $17,350 fine and costs pending the disposition by this Court of the petition for the writ of certiorari.

Respectfully submitted,

EMIL OXFELD
Attorney for Petitioner

APPENDIX A

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM 1972

In the Matter of

FAIR LAWN EDUCATION ASSOCIATION,
Charged with Contempt of Court.

(A-34)

Argued February 5, 1973—Decided MAY 21 1973.

On certification to the Superior Court, Appellate Division.

Mr. Abraham L. Friedman argued the cause for appellant Fair Lawn Education Association (*Mr. Emil Oxfeld,* of counsel; *Messrs. Rothbard, Harris and Oxfeld,* attorneys).

Mr. Alfred J. Luciani, Deputy Attorney General, argued the cause for respondent State of New Jersey (*Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by
WEINTRAUB, C.J.

Appendix A

This is a contempt proceeding arising out of an illegal strike of school teachers employed in Fair Lawn. The strike was continued in violation of an injunction and was still in process when these proceedings were instituted. Fourteen individuals and Fair Lawn Education Association (herein Association), a nonprofit corporation which represented the teachers in that school district, were convicted of contempt consisting of violations of the injunction. The convictions were affirmed by the Appellate Division. We granted the Association's petition for certification, 60 N. J. 500 (1972), to consider whether a fine was lawfully imposed upon it in the sum of $17,350 notwithstanding that a demand for trial by jury had been overruled. At the time of the strike, 347 teachers in the Fair Lawn system were dues-paying members of the Association. The fine thus amounts to $50 per member.[1]

It would not be fruitful to explore the subject of summary trials at common law. The history is not the clearest. As to the contempt process, the history in our country is definitive and sufficient for this case.

The principles which have emerged may be summarized. All contempts of court are penal offenses and may be prosecuted like other offenses. Some, however, may be prosecuted summarily, that is, without indictment or trial by jury. The offenses thus triable summarily consist of misbehavior in the actual presence of the court, misbehavior of an officer of the court in his official transac-

[1] The individual defendants were each sentenced to six months' imprisonment, one month to be served in custody and the balance suspended. Each was fined $400 and placed on probation for one year commencing upon release from jail.

tions, and violation of an order of the court. These categories were established in 1831 by an act of Congress, now 18 U.S.C.A. §§ 401, 402, and in our State in 1917 by a statute, now N.J.S.A. 2A:10-1. *New Jersey Department of Health* v. *Roselle*, 34 N. J. 331, 340-342 (1961); *In re Buehrer*, 50 N. J. 501, 513-516 (1967).

The sole credible basis for the summary contempt process is necessity, a need that the assigned role of the judiciary be not frustrated. But since the summary contempt process lends itself to arbitrary action, the power has been increasingly circumscribed, and this in two ways. One is by the careful recourse to the reason for the summary power, *i.e.*, the need for it, to the end that a summary power be not invoked beyond that need. Indeed the statutory categories referred to above evolved out of grand debate with respect to that underlying necessity. The other safeguard against the risk of arbitrariness consists of procedural requirements designed as antidotes for that risk.

With respect to procedural antidotes, our practice in contempt matters is calculated to limit the risk of arbitrariness and the appearance of arbitrariness. So, for example, when the charge is a violation of a court order, the penal proceeding may not be heard by the judge whose order was allegedly contemned unless the defendant consents to his sitting. R. 1:10-4. Thereby obviated is the risk which inhered singularly in the contempt area when the offended judge sat in judgment of his own charge. For further assurance, R. 2:10-4 provides that a summary conviction for contempt shall be reviewable on the facts as well as the law and thus affords a scope of review not available when guilt has been found by a jury. And our rule forbids a single proceeding both to punish

for contempt and to give relief to the litigant injured by the contumacious act or omission, unless the defendant consents to that course. The punitive proceeding, which the court alone may initiate, must be plainly marked so that the defendant will know that the aim is to punish him. R. 1:10-2, 4, 5. See *New Jersey Department of Health* v. *Roselle, supra,* 34 N. J. at 342-344; *In re Buehrer, supra,* 50 N. J. at 515-516. The rules governing criminal trials apply fully, save only indictment and trial by jury.

As we have said, the summary power rests upon necessity. With respect to court orders, the subject matter before us, the court must be able to compel immediate compliance if the court is to be equal to its responsibility under government. Therein lies the critical difference between a violation of a court order and a violation of some penal statute. A court order is not intended merely to restate some underlying duty or obligation, civil or criminal. Rather, a court order reflects an underlying wrong already done or threatened, coupled with an urgency or some inadequacy in the ordinary remedy which mandates a coercive remedy. So, here, the subject matter was a strike by public employees in the face of the settled rule that such strikes are illegal. *Board of Education, Borough of Union Beach* v. *New Jersey Education Association,* 53 N. J. 29, 36-37 (1968). The Board of Education obtained a restraining order to end this public wrong, but the strike continued in defiance of the order. The power must be the court's to end the public wrong by a procedure which, while not impairing the truth-finding process, will not deny relief by a delay in affording it.

Appendix A

We heretofore considered whether it would be compatible with the necessity underlying the summary contempt power to place a limit upon the punishment which may be imposed upon an individual who disobeys an injunctive order. More precisely we asked whether it would be adequate to hold the consequences within those which ensue upon conviction for a "petty offense" as opposed to conviction for "crime." We concluded the underlying need could be met upon that basis. More precisely, we held the maximum jail term which may be imposed upon a summary trial is six months, and that a summary conviction for contempt would not entail the other consequences which flow from a conviction for "crime." *In re Buehrer, supra,* 50 N. J. at 517-522.

We stress that in *Buehrer* we were concerned with an individual and not with a corporate offender, and the central question was whether a six-month *jail* term would be adequate to satisfy the overriding necessity that a court order be obeyed at once. In concluding that it would suffice, we surveyed the jail sentences theretofore imposed in contempt matters and were satisfied the history of the subject supported the limitation we imposed. *In re Buehrer, supra,* 50 N. J. at 519-520. At that time, our "disorderly persons offense" carried a maximum jail term of one year; it has since been lowered to six months. N.J.S.A. 2A:169-4.

Later it was held in *Bloom* v. *Illinois,* 391 U. S. 194, 20 L. ed. 2d 522 (1968), that a two-year term could not be imposed in a summary trial for contempt. The Court did not decide what was the maximum tolerable when the contempt process is summary. We might add that the contempt in *Bloom* did not present the element of urgency

involved when an injunctive order is disobeyed. In *Bloom* the contempt consisted of the offer of a fraudulent will for probate. In any event, in deciding whether the jail term there imposed was incompatible with a summary proceeding, *Bloom,* as did *Buehrer,* recurred to the ultimate touchstone—necessity, and finding a lesser jail sentence would do, held a two-year sentence was excessive.

Here the offender is an artificial entity. The question is whether a corporation, which of course cannot be jailed, may insist its contempt is not punishable beyond some nominal fine unless the issue of its guilt is decided by a jury. The question is not whether a corporation charged with a *statutory* offense is entitled to the jury process. The subject here is a willful disobedience of an order of the court, and the critical question is whether such a monetary limitation upon trial without a jury would be compatible with the elementary need that the orders of the judiciary be obeyed and be obeyed at once if the underlying wrong which led to the order is to be ended.

It must be remembered that there is no universal right to a jury merely because of the risk of a dollar judgment. So far as money is concerned, judges in equity have always decided issues of civil liability, no matter how large the claim, without the aid of a jury. Indeed, with respect to violations of orders of a court of equity, such as the one here involved, it is clear the Constitution does not entitle a defendant to a jury when the litigant injured by the violation seeks dollar recompense. Thus we are asked to say that a judge who can decide the issue of breach when a litigant seeks relief for the violation is not a suitable finder of the facts if the imposition of the dollar liability has a punitive aim.

Certainly prior to *Bloom* it was not doubted that a corporate contemnor could be punishable by a fine in an amount commensurate with the wrong upon a finding of guilt made without a jury. We may start with the celebrated case of *United States* v. *United Mine Workers of America,* 330 U. S. 258, 91 L. ed. 884 (1947). There a fine of $10,000 was imposed upon the defendant Lewis and a fine of $3,500,000 upon the defendant Union, for violating a court order enjoining a strike. The Court held there was no right to a jury trial. The fine upon Lewis was upheld. As to the Union, the majority concluded that $700,000 should be imposed unconditionally with respect to the wrong done, with the balance of $2,800,000 of the fine made "conditional on the defendant's failure to purge itself within a reasonable time." The Court commented that (330 U. S. at 303, 91 L. ed. at 918):

> "In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge."

It added (330 U. S. at 304, 91 L. ed. at 918):

> "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by the continued

contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

Prior to *Bloom*, it was held in *Cheff* v. *Schnackenberg*, 384 U. S. 373, 16 L. ed. 2d 629 (1966), that a six-month jail sentence imposed upon an individual adjudged guilty of contempt without trial by jury was valid. The Court announced that a six-month term would be the maximum it would thereafter permit in a summary contempt proceeding. It so ruled in an exercise of its supervisory power rather than in response to a constitutional mandate. In reaching that conclusion the Court noted that a "petty offense" was punishable by six months' imprisonment and a fine of $500. 18 U.S.C.A. § 1. We refer to *Cheff*, not for its immediate holding, but rather to contrast the Court's handling of the individual with its handling of the corporate defendant in the contempt proceedings. Although it granted *certiorari* to review a six-month jail sentence imposed on Cheff, the Court denied the petition of the corporate defendant, Holland Furnace, notwithstanding that the fine imposed upon it was $100,000. 384 U. S. at 375, 16 L. ed. 2d at 631. The significance of course is that while granting *certiorari* as to Cheff to decide whether a jail term in excess of the six months' limit upon a petty offense fixed by 18 U.S.C.A.

§ 1 could be imposed without a jury trial, the Court was not moved by the petition of the corporation even though it was subjected to a fine vastly in excess of the $500 maximum of that statute.

In no case has the United States Supreme Court held that exposure to a fine would alone raise a jury issue in a contempt proceeding. The speculation that some monetary limit might apply stems from a statement in *Duncan* v. *Louisiana*, 391 U. S. 145, 20 L. ed. 2d 491 (1968), which case did not involve a contempt charge. There it was held that an authorized statutory maximum of two years made the crime a "serious" one requiring trial by jury. The Court said, 391 U. S. at 161, 20 L. ed. 2d at 503:

> "In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans, supra*, to refer to objective criteria, chiefly the existing laws and practices in the Nation."

It is the words we have italicized, "or the seriousness of other punishment," which are argued to import some monetary figure separating the "serious" from the "petty" offense. We cannot be sure what other "punishments" were intended in *Duncan*. Perhaps loss of office or some comparable consequence was in mind, or perhaps the Court made the reservation simply because it could not be sure whether something other than a substantial jail sentence could later assume such proportions. Nothing in *Duncan* suggests that the amount of a fine would be pivotal. In any event, as we have said, *Duncan* did not involve a con-

tempt charge and thus the Court did not have the relevant question, whether a corporate contemnor must be accorded a jury trial if the fine exceeds a limit applicable to a statutory offense. We cannot assume *Duncan* intended silently to overrule *United Mine Workers*. We are satisfied such a limitation would deny the judiciary the capacity to deal with continued defiance by corporate offenders.

The Association relies upon *United States* v. *R. L. Polk & Co.*, 438 F. 2d 377 (6 Cir. 1971). A consent decree had been entered in 1955. In 1965 the government instituted "civil" and also "criminal" contempt proceedings. In 1969, after *Duncan* was decided, the trial court imposed a fine of $35,000 upon this corporate defendant. The defendant then argued that the fine could not exceed $500, the maximum authorized by the federal statute for "petty offense." As we understand *Polk*, the Court seized upon the reference in *Duncan, supra*, "to the objective criteria found in the existing laws of the Nation," and since under 18 U.S.C.A. § 1, "petty offenses" carried a maximum of six months and $500, *Polk* concluded that a fine in excess of $500 established the offense as "serious" and therefore worthy of jury trial. The difficulty with that exposition is the assumption that the liability of a corporation for contempt may be equated with the liability of a corporation for statutory offenses. In the case of a statutory offense, the Legislature has fixed the maximum. But as to contempt, with respect to which there is no statutory maximum, the court must face the question whether the judicial power will be set at naught by that monetary limit upon a summary trial.

We repeat that the question is not what ought to be done when a corporation transgresses a statute. The

question is what may be done when, as here, a corporation persists in defying the judicial process. We must return to the principle of necessity upon which the summary power rests and depends. The right to jury trial yields to that necessity. The issue is whether a right to a jury can be reconciled with the paramount demand that the court's process be obeyed forthwith. One need but reflect upon how weakened would have been the injunctive order in *United Mine Workers* if a fine in excess of $500 could not have been imposed absolutely or conditionally until after the issue of breach had been decided by a jury (with or without indictment by a grand jury[2]). Necessity, the ultimate test in this controversy, counsels that there be no artificial monetary limitation upon the summary process when an injunction is defied.

Polk was followed but without discussion in *County of McLean* v. *Kickapoo Creek, Inc.*, 51 Ill. 2d 353, 282 N. E. 2d 720 (Sup. Ct. 1972), where the fine of the corporate defendant "exceeded $500." On the other hand, the Supreme Court of Mississippi found *Polk* to be unpersuasive *McGowan* v. *State*, —— Miss. ——, 258 So. 2d 801 (1972), *cert. denied*, —— U. S. ——, 34 L. ed. 2d 298 (1972). Our Appellate Division also rejected the approach which *Polk* accepted. *In re Jersey City Education Association*, 115 N. J. Super. 42 (1971), certif. denied, 58 N. J. 603 (1971),

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[2] If a fine beyond the suggested limit makes the offense a "serious" crime entitling a corporation to trial by jury, it is not evident that a corporation could be denied the right to action by a grand jury either under Art. I, ¶ 7, of the State Constitution or perhaps also under the Fifth Amendment to the Federal Constitution guaranteeing grand jury action with respect to an "infamous" crime. If a grand jury action, too, were accorded, the efficacy of a court order would be further impaired.

cert. denied, 404 U. S. 948, 30 L. ed. 2d 265 (1971). There the Appellate Division correctly held that in the cases in which individuals were defendants, jury trial was accorded only because liberty was involved. As we pointed out in *Buehrer, supra,* 50 N. J. at 519-520, a jail term of six months was enough to ensure compliance with a court order, and for that reason the summary process could support no greater deprivation of liberty. But the dollar limitation which conventionally attends a violation of a *statute* would be wholly inadequate when the order of a court is defied.

Our Appellate Division in the case just cited referred to *Rankin* v. *Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (Ct. App. 1968). Involved were violations of an injunction against a strike by public employees. *Rankin* was decided after *Duncan* and *Bloom.* It was argued that under *Bloom* the offense was a "serious" crime calling for a jury trial. In rejecting that claim, the majority said (242 N. E. 2d at 807-808):

> "Nor does the penalty to which defendant unions are subject—a fine of $10,000 a day or one fifty second (1/52) of the total amount of annual membership dues, 'whichever is the lesser' (Judiciary Law, § 751, subd. 2, Par. [a])—render the contempt a 'serious' crime. The determination, whether it is serious or petty under the decisions, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence. • • • Consequently, as the cases reveal, the fine, even though sizeable in amount, furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime.

> Further, even if the amount of the permissible fine had any relevance, the fine—which in the last analysis must be borne by the union membership (see, e.g., Martin v. Curran, 303 N. Y. 276, 281, 101 N. E. 2d 683, 686)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt."

We think it appropriate to say that in the case before us the fine amounts to but $50 per member, and hence the impact upon the underlying membership is modest in the light of the public wrong. Although the impact per member is not decisive, it helps to put the constitutional issue in perspective.

We agree that the fine was appropriate. The judgment of the Appellate Division is affirmed.

FILED
May 21 1973

FLORENCE R. PESKOE
Acting Clerk

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1186-70

In the Matter of

ILONA MELLOR, JOHN FARAH, KAY STILLWELL, FRANCINE KORMAN, FRED CROUTER, DOUGLAS LEIDNER, MICHAEL CARIELLO, JOSEPH GIORDA, FAIR LAWN EDUCATION ASSOCIATION, CAROLINE ENGLANDER, GERTRUDE GRAPMAN, EVELYN BERGER, JAMES LOMAURO, FRANK DEVENS and JOSEPH AYTON: Severally charged with contempt of Court,

Defendants-Appellants.

Argued February 22, 1972—Decided March 22, 1972.

Before JUDGES SULLIVAN, LEONARD and CARTON.

On appeal from Superior Court, Chancery Division, Bergen County.

Mr. Abraham L. Friedman argued the cause for appellants (*Messrs. Rothbard, Harris & Oxfeld*, attorneys).

Mr. Alfred J. Luciani, Deputy Attorney General, argued the cause for respondent (*Mr. George F. Kugler, Jr.*, Attorney General, attorney).

PER CURIAM

Appendix B

In this school teachers strike case, 14 teachers in Fair Lawn and their Education Association, appeal from a judgment adjudicating each of them guilty of contempt for violation of a restraining order.

On January 22, 1971 the Fair Lawn Board of Education filed a verified complaint and secured an Order to Show Cause and Restraint temporarily restraining the Association and the first eight named defendants "and all persons acting in concert with them" from "counseling [sic], advising, participating in, aiding or abetting, or continuing a strike or work stoppage or other interference with the normal operation of the schools."

On January 27, 1971 the Board filed a verified petition alleging that the Association and the eight original defendants as well as the six additional defendants named above (who also had been served with the complaint, Order to Show Cause and restraints) had violated the court's restraining order. 15 separate Orders to Show Cause were issued, each charging the Association and one of the individual defendants with violating the restraining order and requiring him to show cause why he should not be held in contempt.

All were tried in one consolidated non-jury trial, following which each was found guilty of violating the January 22 restraining order. The Association was fined $17,350. Each individual defendant was sentenced to a six-month term in the County Jail, one month of which was to be served in custody and the balance of the term suspended. Incarceration was stayed until July 1, 1971. Additionally, each defendant was fined $400, payable in installments, if desired, and placed on probation for a period of one year to commence upon his release from

jail. All sentences were stayed pending the outcome of this appeal.

Defendants first contend that they were not proven guilty beyond a reasonable doubt because the following evidence was improperly admitted by the trial court in support of this determination:

> (1) A letter dated January 21, 1971 to the Board from defendant Mellor as president of the Association, advising that the Association "voted to strike" the schools, and urging that the schools be closed in the interest of pupil safety.
>
> (2) A telegram of same date sent to the superintendent of schools by the same defendant as president, stating that the Association "has voted to strike" and urging that the schools be closed.
>
> (3) A letter dated January 24, 1971, on the Association's stationery and signed by defendant Mellor and defendant Crouter, to the superintendent advising him that the Association "decided to continue the strike" and that the "teachers will not be in school on January 25, 1971."
>
> (4) Certain sign-in and sign-out sheets, attendance sheets for the periods January 20 to January 29 and February 1 to February 4, 1971.
>
> (5) Payroll deduction slips for teachers' dues for membership in the Association as well as defendants' written authorizations for these deductions.

Defendants argue that (1), (2) and (3) were improperly considered by the court as proof of *mens rea* against all defendants; that the items referred to in (4) were not

admissible by reason of certain notations placed thereon after the institution of the present proceedings such as "Official Attendance Record," "absent," "strike" and that in considering (5) the trial court relied on membership of defendants in the Association as proof of guilt herein.

Defendants concede that our function in the instant case is to review the evidence *de novo* on the record below. However, they request us "to cleanse the trial record of the evidence erroneously admitted." So viewed, we find that all of the above evidence was properly admitted into evidence and was relevant on the issue of the guilt of all defendants.

Strikes by public school teachers are illegal. *Bd. of Ed., Borough of Union Beach* v. *N. J. E. A., et al.,* 53 N. J. 29, 36 (1968). The New Jersey Employer-Employee Relations Act, N.J.S.A. 13A:1 *et seq.* (P. L. 1968, c. 303) did not give defendants a right to strike. *Lullo* v. *Inter. Assoc. of Fire Fighters,* 55 N. J. 409, 436 (1970). Thus, (1), (2) and (3), sent in furtherance of that illegal activity, are admissible against all parties. *New Jersey Rules of Evidence,* Rule 63 (8); Rule 63 (9)(a) and (b). The attendance records and sign-in and sign-out sheets were properly identified as business records and were admissible pursuant to *New Jersey Rules of Evidence,* Rule 63 (13) and (14). Such notations as may have been inserted thereon following the institution of this proceeding will be stricken therefrom and will not be considered by us in arriving at our ultimate determination. Although membership in the Association is not in itself proof of guilt of the individual defendants, nevertheless, such membership is a factor to be considered together with all other factors in determining their guilt. *In Re Jersey City Education Assoc.,* 115 N. J. Super. 42 (App. Div.

1971), certif. den. 58 N. J. 603 (1971), *cert.* den. —— U. S. —— (1971).

Defendants' contention that defendants' activity on January 22 cannot be considered on the issue of their guilt is without merit. Evidence of activity on that date is admissible to prove their motive, intent, plan or knowledge. *New Jersey Rules of Evidence,* Rule 55.

Defendants' attack on the service of the original Complaint and Order to Show Cause, because of alleged inconsistencies between the affidavits of service executed by the individuals who served the same and their testimony with respect thereto, is without substance. Defendants were not prejudiced by these insignificant inconsistencies. It is not disputed that all the individual defendants were personally served on January 22 or January 23.

Likewise, defendants were not prejudiced by the failure to serve them with a copy of the contempt petition at the time when they were served with copies of the Order to Show Cause why they should not be held in contempt. The latter, which clearly indicated the acts of each defendant that were alleged to be contemptuous, were served on January 27, 28 and 29, 1971. Additionally, defendants' counsel was given a copy of the petition on January 29, the return day of the original Order to Show Cause. The contempt hearing did not commence until February 8 and was continued on February 9 and 16.

Defendants next assert that the adding of the six additional defendants, "*nunc pro tunc,*" to the restraining order and requiring them to defend themselves at this trial violated their rights to due process and equal protection of the law under the Fourteenth Amendment. They have taken certain of the court's remarks made dur-

ing the course of the trial out of context in an attempt to support this allegation. The point is entirely lacking in merit. As noted above, all defendants, including the second group, were personally served with the original complaint, the Order to Show Cause containing the restraints and individual Orders to Show Cause why each should not be held in contempt.

We consider next defendants' claim that the restraining order and the 15 individual Orders to Show Cause were defective because of vagueness and uncertainties and thus they were deprived of their rights under the Fourteenth Amendment of th United States Constitution. It is first to be noted that the validity of the restraining order is justiciable only on appeal from the order and not from an adjudication for contempt thereof. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967); *In Re Tiene,* 17 N. J. 170 (1954); *In Re Jersey City Education Assoc., supra,* 115 N. J. Super. 42. Further, we find no basis for this constitutional challenge. The operative language of the Orders to Show Cause and of the restraining order gave adequate notice to defendants of the charges upon which they would be tried and met the spirit and intent of R. 1:10-2(a) as well as their rights to due process. *Bd. of Ed. of Newark* v. *Newark Teachers Union,* 114 N. J. Super. 306, 316-317 (App. Div. 1971), certif. den. 58 N. J. 605 (1971), *cert.* den. —— U. S. —— (1971). Defendants' attempt to equate the specificity required in the Order to Show Cause with that required in a criminal complaint or indictment is unsound.

Although not identical in language, the charges set forth in the contempt Order to Show Cause were clearly encompassed in the provisions of the restraining order. Defendants were not prejudiced by the absence of dates,

since the days on which the violations were alleged to have taken place were known to all.

Defendants' assertion that the restraint forced them to work in violation of the Thirteenth Amendment is frivolous. Although they could not strike, they could resign if they so desired.

We have considered all other constitutional and legal issues raised by defendants and determine that they all lack merit.

Next, we turn to the issue of defendants' guilt. We have carefully reviewed the entire record of proceedings *de novo,* and reach the following independent findings and conclusions. We find beyond a reasonable doubt that each defendant, having been personally served with the restraining order dated January 22, 1971, had actual knowledge of the contents thereof and thereafter did willfully and knowingly violate the terms thereof by conseling, aiding or otherwise participating in a strike against the Board which activity interfered with the normal operation of the Borough schools and caused their closing. Thus, we find the Association and each individual defendant guilty of contempt of that order beyond a reasonable doubt.

Finally, we turn to the penalty to be imposed. Although it is unfortunate that resort must be had to a contempt of court procedure in this situation, under the totality of the circumstances, we concur in the sentences imposed by the trial court on each defendant, except as we modify the terms of probation: A fine of $17,350 is imposed on the Fair Lawn Education Association. Each one of the above-named individual defendants is sentenced to a term of six months in the Bergen County Jail, one

month of which is to be served in custody and the balance of the term is suspended. Actual incarceration is stayed until July 1, 1972. Further, each individual defendant is fined $400 and is placed on probation for a period of one year to commence upon his or her release from the Bergen County Jail. The only condition of probation will be that he or she must refrain from participating in any illegal activity, including but not limited to striking or work stoppage in connection with his or her employment by the Board of Education. The individual fines, upon the request of any defendant, may be paid in installments.

There is no merit to defendants' contention that the consolidation of the trials of all the individual defendants and the imposition of a fine upon the Association in excess of $500, violates the constitutional right of each defendant to a jury trial. *In Re Jersey City Education Assoc., supra,* 115 N. J. Super. at 51-58.

Judgment accordingly.

APPENDIX C

Order to Show Cause (In Contempt) of the Superior Court of New Jersey, Chancery Division

(Filed—January 27, 1971.)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY

DOCKET NO. .....

CIVIL ACTION

In the Matter of

FAIR LAWN EDUCATION ASSOCIATION
Charged with Contempt of Court

The attention of this court having been drawn to a verified petition executed by Maurice D. Emont, attorney for the Board of Education for the Borough of Fair Lawn, to which are annexed the affidavits of Walter J. Pipp, Assistant Superintendent of Schools of the Borough of Fair Lawn, Donald A. Fusco, Arthur H. Brotherton, and Paul Christie, and its appearing therefrom that Fair Lawn Education Association may be in contempt of this court in that it:

(a) Violated an Order of this Court dated January 22, 1971, prohibiting it from striking or participating in a strike against the Board of Education of the Borough of

Fair Lawn and the school system of the Borough of Fair Lawn, County of Bergen, New Jersey.

(b) Violated an Order of this Court prohibiting it from aiding or abetting said strike and from counselling teachers to strike against the Board of Education of Fair Lawn and the schools of the Borough of Fair Lawn.

(c) Violated an Order of this Court dated January 22, 1971, which prohibited it from doing any act which will disrupt the lawful and orderly conduct of the schools in that by its acts it caused the closing of said schools.

It is therefore on this 27th day of January, 1971

ORDERED, that said Fair Lawn Education Association show cause before this court in the Chancery Division Courtroom, Passaic County Court House, Paterson, New Jersey, before the Honorable Theodore W. Trautwein on the 8th day of February 1971, at 9:30 o'clock in the forenoon, why it should not be held in contempt of this court.

IT IS FURTHER ORDERED pursuant to R.R. 1:10-4 that Richard Fiore, a member of the Bar of this State, be and he is hereby appointed to prosecute this order.

IT IS FURTHER ORDERED that a true copy of this order be served by Donald Fusco, Arthur H. Brotherton, or Paul Christie upon the said defendant Fair Lawn Education Association within 2 days of the date hereof.

EUGENE L. LORA,
J.S.C.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-35

FAIR LAWN EDUCATION ASSOCIATION,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENT
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

ALFRED J. LUCIANI
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
7 GLENWOOD AVENUE
EAST ORANGE, NEW JERSEY 07017
OF COUNSEL AND ON THE BRIEF

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October Term, 1973

No.

FAIR LAWN EDUCATION ASSOCIATION,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

STATEMENT OF THE CASE

The petitioner, Fair Lawn Education Association, is a non-profit corporation of the State of New Jersey which serves as the collective bargaining representatives of teachers and related personnel in the Borough of Fair Lawn's school system. New Jersey Laws of 1968, *N.J.S.A.* 34:13A-1 et seq.

The petitioner knowingly violated a New Jersey court order restraining a public employee strike. The association was found guilty of criminal contempt of court in a summary proceeding and ultimately fined $17,350.00.

In Petitioner's application before this Court, it is urged that the imposition of a fine exceeding $500 in a summary proceeding is violative of Sixth Amendment of the federal Constitutional guaranteeing a jury trial.

SUMMARY OF ARGUMENT

An artificial entity, not capable of being imprisoned, is not entitled to a jury trial in a criminal contempt prosecution.

ARGUMENT

A CORPORATE ENTITY IS NOT CONSTITUTIONALLY ENTITLED TO A TRIAL BY JURY IN A CONTEMPT PROCEEDING IRRESPECTIVE OF THE MONETARY FINE IMPOSED AS PUNISHMENT.

"The subject here is willful disobedience of an order of the court (by a corporation), and the critical question is whether . . . a monetary limitation, (on a fine) upon trial without a jury would be compatible with the elementary need that the orders of the judiciary be obeyed and be obeyed at once if the underlying wrong which led to the order is to be ended." *In re Fairlawn Education Association*, 63 *N.J.* 112,——A.2d—— (1973); (PIA). In such a case, the summary power rests upon the necessity of the judiciary to compel immediate compliance with court orders. *Id.* at 115-116, ——A.2*D* at——. And the monetary limitation on a corporate fine can be no less than that amount necessary to insure obedience.

Simply then, the issue is whether a right to a jury trial inheres upon the imposition of a substantial fine, and thus transcends the judicial power to insure immediate compliance with a court order. It should be borne in mind that no possibility of imprisonment existed in either case now before the Court, as both contemnors are corporations.

There is no dispute that certain offenses are properly tried summarily, that is without indictment and trial by jury. The initial inquiry then is whether criminal contempt is that class of offense requiring a jury trial irrespective of the penalty authorized or imposed.

The nature of criminal contempt, an offense *sui generis* in nature, is not a criminal action which falls per se within the requirements of Article III or the Sixth Amendment of the federal constitution. *Cheff v. Schnackenberg*, 384 *U.S.* 373, 378-380 (1966). "For purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses. The defendant is entitled to a jury trial unless the particular offense can be classified as petty." *Frank v. United States*, 395 *U.S.* 147,148 (1969). Under the doctrine of *Bloom v. Illinois*, 391 *U.S.* 194-198 (1968), contempt of court must be denominated a petty

offense unless the punishment actually imposed makes it a "serious" one.

Both *Bloom* and *Frank* considered sentences involving imprisonment imposed in summary contempt proceedings in determining the seriousness of the offense. In *Bloom* the imposition of two years imprisonment after summary trial for contempt was held to be violative of that defendant's right to a jury trial. In contrast, *Frank* upheld a conviction for summary contempt where the defendant was given a suspended sentence and placed on probation for three years. It is clear that neither *Bloom* nor *Frank* ever considered the maximum dollar fine that could be imposed in a summary proceeding for criminal contempt.

So too, in *Baldwin v. New York*, 399 *U.S.* 66,69 (1970), the Court considered "seriousness" in terms of imprisonment. The Court concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." Research has disclosed no Supreme Court case holding that the dollar amount of the fine might give rise to the right to a jury trial. But see *Schick v. United States*, 194, *U.S.* (Dissenting opinion, Harlan, J., at 838-839); *United States v. Barnett*, 376 *U.S.* 631 (1964) (dissenting opinion, Goldberg, J., at 751-760, which intimates that anything other than a trivial "penalty" would give rise to the right to a jury trial); *United States v. Barnett, supra*, (dissenting opinion, JJ. Black and Douglas, at 724 to 729 and cases cited in notes three and four of that opinion).

Recent speculation that some monetary limit might give rise to the right to a jury trial stems from a statement in *Duncan v. Louisiana*, 391 *U.S.* 145 (1968), which did not involve a contempt charge. There it was held that an authorized statutory maximum of two years made the crime a "serious" one requiring trial by jury. This Court said, "In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra*, (300 *U.S.* 617, 57 *S.C.* 660, 81 *L. Ed.* 843), to refer to objective criteria, chiefly the existing laws and practices in the Nation." *Id.* at 161. The italicized words above are argued to import some monetary figure separating the "serious" from the "petty" offense. Yet nothing in *Duncan* suggests that the amount of a fine would be pivotal. Moreover,

Duncan did not involve the question of whether a corporate contemnor must be accorded a jury trial if the fine exceeds a limit applicable to a statutory offense.

It is the respondent's position that the Constitution of the United States does not require a jury trial in a contempt proceeding where the only punitive sanction imposed is a fine, irrespective of the amount.

It appears that at common law there was no monetary limit to a fine which could properly be imposed without the formalities of a criminal prosecution, *i.e.*, indictment and trial by jury. In the "great justice book" Dr. Richard Burn lists the offenses which were properly tried summarily at common law. Burn, *Justice of the Peace*, 3d ed. "In these, there is no intervention of a jury, but the party accused is acquitted or condemned by the sufferage of such person only as the statute has appointed for his judge." 4 *Blackstone's Commentaries*, 281, n.b. In their learned article, Messrs. Frankfurter and Corcoran summarize Burn's list of offenses prosecuted through the magistrates:

> "(A perusal of Burn's works) discloses at least seven with 20 pounds' penalty, three with fifty pounds, one with one hundred pounds, and one with five hundred pounds. *Qui tam* recoveries were also heavy. At least eight offenses were penalized at twenty pounds, one at twenty-five pounds, five at fifty pounds, two at two hundred pounds, and one at five hundred pounds. Bearing in mind changes in money values, we get some measure of the outside limits of punishment which the common law, as a matter of routine procedure, enforced through magistrates, coincident with its regard for the system of jury trial." Frankfurter and Corcoran, "Petty Federal Offenses and Trial by Jury," 29 *Harv. L. Rev.* 917, 932 (1926).

According to Frankfurter and Corcoran, the colonies too retained several areas of summary prosecution although fewer matters were entrusted to justices than were in the contemporary English law. *Id.* at 936. The colonial legislatures, like Parliament, made no sharp distinction between formal criminal prosecutions

and *qui tam* of civil procedures against offenders which were directed to the same end. *Id* at 937, n. 91. Colonial New Jersey likewise recognized the utility of the summary proceedings. *Id* at 950. The article concludes that an historical examination reveals:

> "First, that all the colonies whose records have been examined, acted on the conviction that the much-cherished jury procedure was not imperative for small offenses; secondly, that the practice of summary procedure, pursued in varying measure by the different colonies, persisted unchallenged through the acrimonious controversy with the crown over the denial of the jury in admirality courts, through the framing of the jury clauses in state constitutions and through the enactment of the jury clauses in state constitutions and through the enactment of the jury clauses in the federal constitution." *Id.* at 937.

Research has disclosed no case or any authority which purports to set a constitutionally prescribed dollar limit, or that has equated a monetary fine to the right to trial by jury under Article III or the Sixth Amendment to the Federal Constitution. The same holds true of the jury provision of the New Jersey Constitution.

On the other hand, there is authority to conclude that the right to a jury trial is dependent upon a defendant's exposure to the possibility of imprisonment:

> "But it is only where personal liberty is involved that the jury guarantees of Article III and Amendment IV come into play. Alexander Hamilton said that the friends of the plan of the Federal Convention who as to this matter constituted the more conservative group, regarded the trial by jury 'as a valuable safeguard to liberty.' Hamilton's further elucidation of the topic in *The Federalist* clearly shows that the jury assurance of Article III was designed, in accordance with the attitude of the time, to secure personal liberty, and that the protection of private property was left to

Congressional statutory regulation.

> The language of the Amendments of 1791 is easily read consistently with Hamilton's conception that the preservation of liberty was exclusively the function of the criminal jury, and that the protection of property was primarily the task of the civil jury. For although Amendment VII preserved jury trial in all suits 'at common law,' which would mean criminal as well as civil proceedings, the right was restricted to cases where the value and controversy exceeded twenty dollars. The monetary limitation evokes the idea of property interests. Moreover, since certain proceedings criminal in form affected property rights by enforcing fines, penalties and forfeitures, extension of the Seventh Amendment's guarantee beyond private civil actions into this area could well have been intended. In harmony with this interpretation, the application of Amendment VI, assuring the safeguard of a jury against arbitrary imposition of the only remaining criminal sanctions of imprisonment or capital punishment, would be limited to cases involving life or liberty, consistently with Hamilton's analysis." Kaye, "Petty Offenses Have No Peers!" 26 *U. Chi.L. Rev.*245 (1958-1959).

Compare, Comment, "Civil and Criminal Contempt in the Federal Courts," 57 *Yale L.J.* 83, 95-99 (1947).

Consistent with the foregoing is this Court's decision in *United States v. United Mine Workers of America*, 330 *U.S.* 258 (1971). In that case, both the Union and John L. Lewis were found guilty of civil and criminal contempt: the Union was fined $3,500,000, while an individual, John L. Lewis was fined $10,000. Neither had been afforded a jury trial.

In considering the defendant's argument that the fines imposed are arbitrary and excessive, the Court concluded that the fine against the Union should be reduced from $3,500,000 to $700,000; the fine imposed upon defendant Lewis was deemed proper. In reaching this conclusion the Court considered defendants' claim that they were entitled to a jury trial under the Norris-La Guardia Act:

". . . defendants . . . urge only their right to a jury trial as provided in Section 11 of the Norris-La Guardia Act. But Section 11 is not operative here, for it applies only to cases 'arising under this act' and we have already held that the restriction upon injunctions imposed by the act do not govern this case. The defendants, we think, were properly tried by the court without a jury." *Id.* at 298.

This Court then explained the considerations that may be weighed by a trial court in assessing the penalty in such a case:

"Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers v. Bucks Stove and Range Co., supra,* 221 *U.S.* 441, 55 *L.Ed.* 805, 35 *S.Ct.* 492 34 L.R.A. (ns) 874). The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge." *Id.* at 302-303.

After discussing the criteria to be used in imposing judicial sanctions in civil contempt, both to coerce the defendant into compliance with the court's order and to compensate the complainant for the losses sustained, the Court added that: "In fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, (the courts should) consider the amount of defendants' financial resources and the consequent

seriousness of the burden to that particular defendant." *Id.* at 304.

Of the other opinions in the *Mine Workers* case, none would have reversed the decision for want of a jury trial. In his concurring opinion, Mr. Justice Frankfurter observed that "(f)or obvious reasons, the petitioners do not claim that the constitution of the United States affords them a right to trial by jury." *Id.* at 307, 311, n.2. Justice Black and Douglas would have held that only civil contempt would have been applicable to the facts of the case; instead of imposing a criminal penalty in this case, they would have placed coercive conditional fines on the defendants for "(d)efendants could then avoid payment by purging themselves." *Id.* at 335; see also dissenting opinion of Rutledge, J., p. 364, n.30, p. 367, n.33, pp. 374-376.

In his dissenting opinion in the same case (330 U.S. at 342), Mr. Justice Rutledge would have concluded that the fine imposed on the Union was excessive within the Eighth Amendment's prohibition. "And for determining excessiveness of criminal fines there are analogies from legislative action which in my opinion are controlling." Mr. Justice Rutledge recited the maximum dollar fines permissible for those crimes recognized by Congress ranging in amount from $5,000 to $20,000. *Id.* at 377, n.53. It was his position that "(l)egislative experience and judgment in this field therefore furnish a measure entitled to great and in some instances I think conclusive weight for consideration of the allowable range of punishment, as such, in criminal contempts where the penalty is undefined by statute." *Ibid.*

Cases following the *United Mine Workers* case have been in accord with the majority's views. For example in *International Union, United Mine Workers of America v. United States,* 177 *F.* 2*d* 29, 36 (D.C. Cir. 1949), *cert.* denied 338 *U.S.* 871 (1950), the court upheld fines of twice those approved in the *United Mine Workers* case mentioned above. In the face of a claim that the fines were excessive, the Court held that "by constitutional and decisional standards" the amount of the fines were proper, especially in light of the fact that the offense involved occurred after the handing down of the *United Mine Workers* case and involved the same labor organizations. See also *United States v. Brotherhood of Railroad Trainmen,*96 *F.Supp.* 428 (D. Ill. 1951) which upheld the $25,000 fine imposed in one sum for both criminal and civil contempt.

And, in *Drivers, Chauffers and Helpers Local No. 639 v. Penello,* 40 *F. 2d.* 632 (D.C. Cir. 1969), the Court observed:

> "(I)n a case such as the one now under consideration, where compliance (with the court order) has been achieved before imposition of the fine, the focus instead should be upon the gravity of the offense. In this regard it has been stated that, 'where, as here, the purpose of the contempt proceedings is to vindicate the authority and dignity of the court, the punishment imposed should bear some reasonable relation to the nature and gravity of the contumacious conduct. *United States v. Conole,* 365 *F. 2d* 306, 308 (3rd Cir. 1966).' " *Id.* at 634.

On this basis, the court reduced a fine of $20,000 to $10,000 being, "of the opinion that the vindication of the District Court's authority through punishment of the Union, and the desired effect of such punishment upon its future conduct, would be as well served by a fine of $10,000 as one of $21,000." *Id.* at 635.

So too, in *Rankin v. Shanker,* 23 *N.Y. 2d* 111, 295 *N.Y.S. 2d* 625, 242 *N.E. 2d* 802 (Ct. Appl. 1968), the New York Court of Appeals upheld a fine of $10,000 per day or 1/52 of the total amount of annual membership dues "whichever is the lesser." See, penalty provisions contained in the *Taylor Law, Jud. Law* §751, subd. 2, par. (a). There the court reasoned that:

> . . . the determination, whether it is serious or petty under the decisions, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence. (See *ex parte Wilson,* 114 *U.S.* 417, 428 5 *S.Ct.* 935, 29 *L. Ed.* 89; *People v. Bellinger,* 269 N.Y. 265, 271, 199 *N.E.* 213, 216; *Matter of McKinney v. Hamilton,* 282 *N.Y.* 393, 397, 26 *N.E. 2d* 949, 951, 127 *A.L.R.* 1283). Consequently, as the cases reveal, the fine, even though sizeable in amount, furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any relevance, the fine—which in the last analysis must be borne by the Union membership (see *e.g., Martin v. Curran,* 303 *N.Y.* 276, 281, 101 *N.E. 2d* 683, 686) - is actually small, amounting, at most, to be no more

than a member's weekly union dues for each day of the contempt." (295 *N.Y.S.* 2*d* at 632, 242 *N.E.* 2*d* at 807-808).

See, *In re Jersey City Education Association*, 115 *N.J. Super.* 42, 53-58, 278 *A.* 2*d.* 206 (App. Div. 1971), certif. den. 58 *N.J.* 603 (1971), *cert.* denied 404 *U.S.* 948 (1971); see also *McGowan v. State*, ——— *Misc.* ———, *258 So.* 2*d* 801 (1972), *cert.* denied ——— *U.S.* ——, 34 *L.Ed.* 2*d 298 (1972).*

This Court's action subsequent to the Mine Workers case is also relevant. In *Cheff v. Schnackenberg*, 384 *U.S.* 373 (1966), Holland Furnace's petition for certiorari was denied, (381) U.S. 924 (1965)), despite a $100,000 fine after trial without a jury; however, an individual's petition arising from that same action was granted to determine if he had been denied his right to a jury trial. The individual had been sentenced to six months imprisonment. This Court upheld his conviction, and in an exercise of its supervisory function over the lower federal courts stated that "(w)e rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof." *Id.* at 380. *Cheff* obviously did not address itself to the issue of fines. See *Clark v. Boynton*, 362 *F.* 2*d* 992, 999 n.17 (5th Cir. 1966).

At first glance, *United States v. R.L. Polk & Co.*, 438 *F.* 2*d* 377 (6 Cir. 1971), appears to be contrary authority; however, that case involved the issue of whether the penalty provisions of a federal statute (18 U.S.C.A. §1), limiting the maximum fine for a conviction of a petty offense to $500, was applicable to a corporation found guilty of criminal contempt in a summary proceedings. The *Polk* court reversed a $35,000 fine imposed without a jury trial for the violation of an antitrust consent decree on the basis of its belief that 18 U.S.C.A. §1 set the limit for *all* petty offenses whether committed by an individual or corporation. Accordingly, the fine was reduced to $500. See also *County of McLean v. Kickapoo Creek, Inc.*, 51 *Ill.* 2*d.* 353, 28 *N.E.* 2*d* 720 (Sup. Ct. 1972). However, *Polk* does not stand for the proposition that there is a constitutional limitation on the dollar amount of the fine. The decision in that case was based solely on what that court believed to be the limitation on fines imposed by Congress for all petty offenses, irrespective of their origin. Respondent herein does not agree with the reasoning of the *Polk*

court. It is submitted that the legislative branch of government may not impair the power of the judiciary to secure compliance with court orders. Moreover, in New Jersey the Legislature has not seen fit to prescribe maximum penalties for criminal contempt. See *N.J.S.A.* 2A:10-5 and the construction of that statute in *Department of Health v. Roselle*, 34 *N.J.* 331, 345-346, 169 *A.* 2*d* 153 (1961). See also *In re Beuhrer, et al*, 50 *N.J.* 501, 236 *A.* 2*d* 592 (1967).

So far as could be determined, there is no constitutional limitation on the dollar amount of fine, with or without a jury trial. The amount of the fine must be judged in light of the Eighth and Fourteenth Amendments of the Federal Constitution.[1] In terms of due process of law, (i) it must be remembered that there is no univeral right to a jury merely because of the risk of a dollar

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[1] Petitioners do not contend that the Seventh Amendment to the federal Constitution gives rise to a right to a jury trial. Research has disclosed no case which would have afforded the right under the Seventh Amendment, which is essentially a preservative type of jury guarantee, to the criminal contempt situation, even though a monetary fine had been imposed. However, historically a jury trial was neither required nor used in criminal contempt cases. See 4 *Blackstone's Commentaries*, 286-287. Whether or not Blackstone mistakenly categorized the common law procedure regarding summary contempt for offenses committed out of the presence of the court (see Goldfarb, *"Civil Rights v Civil Liberties; the Jury Trial Issue,"* 12 *U.C.L.A.L. Rev. 486, 488-489* (1965), the doctrine has remained constitutionally inviolate in our law until the holding in *Bloom v. Illinois, supra*. One commentator has observed that the:

> "Seventh Amendment does apply to civil cases and requires a jury trial in those involving more than twenty dollars, but it speaks only of suits at common law. Since the civil or coercive kind of contempt is usually thought of as equitable in nature and not part of the common law, the Seventh Amendment, even if applicable to the states, would not seem to be controlling. Of course, it would be possible for the Court to hold that the Fourteenth Amendment's due process requirement imposes the jury trial obligation upon states quite apart from the Seventh Amendment's terms." Dobbs, "Contempt of Court: A Survey," 56 *Cornell L. Rev.* 183, 227-234, 274 to 282 (1971).

judgment. So far as money is concerned, judges in equity have always decided issues of civil liability, no matter how large the claim, without the aid of a jury. Indeed, with respect to violations of orders of a court of equity, such as the one here involved, it is clear the Constitution does not entitle a defendant to a jury when the litigant injured by the violation seeks dollar recompense. Thus we are asked to say that a judge who can decide the issue of breach when a litigant seeks relief for the violation is not a suitable finder of the facts if the imposition of the dollar liability has a *punitive aim. Cf. United States v. United Mine Workers of America, supra* at 300, in which this Court concluded that the federal Constitution did not preclude a single trial combining civil and criminal contempt.

The final inquiry is whether corporations are sufficiently dissimilar to individuals to warrant different punishment upon conviction for contempt in a summary proceeding.

A corporation cannot be sent to jail. This Court has recognized this fact, albeit in another context. See *Melrose Distillers Inc., et al. v. United States,* 359 *U.S.* 271, 274 (1959). This premise then is the basis upon which the respondent asserts that there is a substantial difference between an individual and a corporation, and justifies a difference in the maximum dollar amount of fine permissible for an individual (*In re Beuhrer, supra*) and a corporation (*In re Jersey City Education Assoc., supra*). As the Superior Court of New Jersey, Appellate Division observed in the *Jersy City* case:

> "Unlike union officers, the union itself cannot be jailed for contempt. On the other hand, the citation of all striking members individually and the invocation of plenary proceedings as to each present an impracticable alternative method of vindicating the public wrong committed by the willfull defiance of the order.[2] We observe also that the sting of a

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The State would assert at this juncture that it would be an unfair hardship in most instances to cite each individual member and have them subject to a prison term as well as a fine when in all probability the penalty assessed would be less when divided amongst its membership that would be the penalty assessed against the individual contemnor.

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> $500 or $1000 maximum fine even on a daily basis, would not, in all probability, serve as a deterent to a large union calling a strike of public employees.
>
> We are of the opinion that corporations are sufficiently dissimilar to individuals to warrant the imposition of a fine exceeding $1000 in a summary contempt proceeding. A greater fine does not transform the contempt from a petty to a serious offense and would not require the incidence of indictment and trial by jury. Consequently, a fine, limited only by reasonableness, may be imposed against a corporate defendant in a summary contempt proceeding." (115 *N.J. Super.* 57-58).

That is not to say that a corporate defendant is not afforded every right attributable to the due process clause:

> "To that end, our rules embody sundry restraints. The judge whose order was allegedly breached may not hear the charge unless the defendant consents; the contempt process may be instituted only by the court, lest the litigant turn it to private gain; the defendant shall be informed plainly that the proceeding is penal as distinguished from one for the further relief of the litigant; the penal charge may not be tried with the litigant's application for further relief unless the defendant consents; a conviction is reviewable upon appeal both upon the law and the facts and the appellate court shall give such judgment as it shall deem just. The presumption of innocence of course obtains, and the burden of the prosecution is to prove guilt beyond a reasonable doubt. Thus, the defendant is afforded all the rights of one charged with crime except the right to indictment and to trial by jury." See *In re Beuhrer, supra* at 515-516.

It is submitted that there is no constitutional compulsion to treat a corporation identically to an individual in the same situation. See for example, *Standard Oil Company v. Tennessee,*

217 *U.S.* 413 (1909), where Justice Holmes disagreed with a corporation's argument that it was denied equal protection and due process because prosecution was initiated by bill in equity as opposed to the incidence of grand jury and indictment as would have been the procedure afforded a natural person. It should also be noted that in that case the penalty provisions for the same acts were different; the consequence for a violation of a corporation was ouster, whereas an individual was subject to normal penalties.

The *Polk* decision, *supra*, supports the conclusion that constitutionally different treatment might be afforded a corporation as opposed to an individual in the punishment of criminal contempt. There the court held only that in the absence of congressional promulgation of different sanctions for a corporation, the general sanctions, legislatively adopted, must be deemed applicable. Far from foreclosing the possibility of such legislative action, the court noted that the present penalty provisions of the general section were of little consequence to a large corporation and therefore served little deterrence in protecting the court's orders.

Although the common law restrictions on indicting corporations for criminal acts no longer exist,[3] certain distinctions between individuals and corporations remain intact. For example, in *Campbell Painting Corporation v. Reid*, 392 *U.S.* 286 (1968), this Court held that the Fifth Amendment privilege against self-incrimination applies only to natural individuals. *Id.* at 288. The State submits that other constitutional differences exist, one being that in terms of punishment available, it is valid to consider that a corporation cannot be jailed.

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[3] At common law corporations as they are known today did not exist. More importantly, those corporations which did not exist could not be prosecuted for the common law crimes:

> ". . . (g) a corporation cannot commit treason, or felony, or other crime, in its corporate capacity; (h) though its members may, in their individual capacities. (i) neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood," 1 *Blackstone's Commentaries*, Chapter 18, "On Corporations," at p. 476.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Certiorari in this case be denied.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENT

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